IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 834

PAUL GINSBURG, Petitioner,

v.

HORACE STERN, ALLFN M. STEARNE, CHARLES ALVIN JONES, JOHN C. BELL, JR., THOMAS McKEEN CHIDSEY, MICHAEL A. MUSMANNO, and JOHN C. ARNOLD, individually and jointly as Justices of the Supreme Court of Pennsylvania, Respondents.

MOTION TO REMAND

PAUL GINSBURG,
Counsel for Petitioner

Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

SMITH BROS. CO., INC., LAW PRINTERS, 430-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

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MOTION TO REMAND

Paul Ginsburg, petitioner, respectfully moves that this Honorable Court vacate its Order of May 5, 1958, denying his timely petition for rehearing in the above-entitled case, then vacate its Order of April 14, 1958, denying the petition for writ of certiorari in the above-entitled case, and enter an Order that this case be remanded to the District Court, as authorized by Section 2106 of the Judicial Code and the law of the case of *United States of America v. Shotwell Manufacturing Company, et al.*, 355 U.S. 233 (December 16, 1957). The reasons for granting this motion are as follows:

1. The District Court's Order (23a) dismissed the Complaint under Rule 12 for the reason that "the doc-

trine of judicial immunity from suits irrespective of the Civil Rights Act" is a complete defense to the instant action.

2. The affirmance by the Court of Appeals (App. 2) was not based upon the ground of immunity, but on a different ground,—that the Complaint fails to state a cause of action regardless of the defense of immunity.

3. The decision of the Court of Appeals in effect reversed the District Court, and reaffirmed its holding in *Picking v. Pennsylvania R. Co.*, 151 F.2d, 240 (1945) which is upheld by decisions of this Honorable Court, including *Tenney v. Brandhove*, 341 U.S. 367 (1951), wherein it was held that members of the state judiciary acting in official capacity are not immune from suits in federal Courts for deprivation of citizens' rights under the Constitution and laws of the United States, particularly the Civil Rights Acts.

4. It follows that the Court of Appeals handed down a decision on an issue which was not procedurally before it, because the issue of the sufficiency of the Complaint aside from the doctrine of immunity was not considered or passed upon by the District Court, nor is there yet any record established on which the District Court could dismiss for insufficiency. Accordingly, that issue could not have been considered or passed upon by the Court of Appeals on the appeal, or by this Honorable Court on certiorari. Reason 4 for allowance of the writ contains (Petition, 21-22) authorities in support of the point that the jurisdiction of the Court of Appeals is exclusively appellate, with the limited function of considering and rectifying errors of the District Court. This Honorable Court, granting petitioner's Motion to

Remand in *U.S. v. Shotwell, supra,* decided that the District Court is the only forum wherein to establish the record on issues; and, in the absence of a Hearing on a particular issue for establishing a record of it in the District Court, that issue cannot be the subject of an appeal in the Court of Appeals or of review in the Supreme Court. Therefore, the Court of Appeals was powerless to affirm as it did.

5. In these circumstances, it is respectfully submitted that the Court of Appeals has deprived your petitioner of his right to a day in court by foreclosing his right under the federal Rules of Civil Procedure in the District Court to a Hearing on the issue of the sufficiency of the Complaint.

Wherefore, the interests of justice would be served by remanding this case to the District Court for a Hearing to establish a record on the issue of the sufficiency of the Complaint.

Respectfully submitted.

PAUL GINSBURG,
Counsel for Petitioner

Dated: 19 May, 1958.